IN THE

Supreme Court of the United States

October Term, 1943.

No. .....

MARTIN LUKSICH,

Petitioner,

vs.

DOMENIC MISETICH, JAKOV MISETICH, IVAN MISETICH and ANTON MISETICH,

Respondents,

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

Martin Luksich was injured on May 2, 1941, while working as a seaman-fisherman on the American vessel "Lucky Star," owned by Domenic Misetich, Jakov Misetich, Ivan Misetich and Anton Misetich. The injury consisted of dislocation of the right shoulder. He was 60 years of age at the time. He filed a suit for wages, maintenance and cure, and damages under the *Jones Act*. He claimed that he was employed for the tuna season, from April to July, 1941, and the sardine season immediately follows.

I.

The District Court held he was employed for only the tuna season, and gave him his share of the catch for the season.

II.

The District Court denied him recovery for injuries, pursuant to the *Jones Act,* and allowed him maintenance and cure to June 3, 1942, although he was continuously under care of the United States Public Health Service to the date of trial in January, 1943, and still had not been discharged. He was still disabled from work at the time of trial.

The Circuit Court of Appeals affirmed the District Court, excepting that it held that the Shipping Articles did not include the whole contract of employment, and, that parol evidence was admissible to prove the entire contract.

The questions presented for the determination of this Court are:

(1) Are Shipping Articles *null and void* when they are not signed before and by a Shipping Commissioner of the United States, when the voyage is from the Port of Los Angeles to Mexican waters, Mexico?

(2) Is a seaman, injured in the course of his employment, entitled to maintenance and cure so long as his injury is disabling and medical attention and treatment give him relief from the paid and suffering caused by the injury?

(3) Should the Circuit Court of Appeals have taken additional evidence as to a change in petitioner's condi-

tion, resulting subsequent to the trial and prior to the appeal to the Circuit Court of Appeals?

(4) Should the Circuit Court of Appeals have taken the evidence of the Master of the "Lucky Star" to clarify the record as to the term of petitioner's employment?

(5) As a matter of law, was the established usage and custom of employment incorporated in the contract of employment of petitioner?

Summary of Petitioner's Contention.

(1) With respect to the validity of the purported *shipping articles,* it is petitioner's contention that they are *null and void* and do not constitute any portion of the contract of employment of petitioner.

It was the decision of the United States Circuit Court for the Ninth Circuit, in *The Lily,* 69 Fed. (2d) 898, affirming the same case in 4 Fed. Supp. 268, that purported *Shipping Articles* from Los Angeles Harbor to Mexican waters, Mexico, were *null and void* when they were not signed by the crew and signed before a United States Shipping Commissioner. The Circuit Court of Appeals refused to accept such purported *Shipping Articles* as a contract of employment. In the case at bar, identical ports and Mexican waters are involved, yet the United States Circuit Court of Appeals held that such purported *Shipping Articles* in this case, constituted a valid contract of employment.

It has been the view of the various parties, including the United States District Judge, before whom this case was heard on trial, that Shipping Articles are necessary for such voyages as petitioner sailed. The Honorable

Judge of the District Court said: "It may be unfortunate that circumstances make those shipping articles necessary. I have never been able to understand why the Department of Commerce insisted upon those contracts, but after all there they are and that is what they are, contracts." [Clk. Tr. p. 190.] No such rule is known of by petitioner.

If *Shipping Articles* are, or are not required, then these purported shipping articles must fall, as they are not properly executed nor do they contain when the men should be on board, nor do they set forth the wages.

It is further apparent from the evidence and it is undisputed, that petitioner was employed as a member of the crew of the "Lucky Star" on April 8, 1941, one week prior to the signing of the purported shipping articles. The contract of employment was made on April 8, 1941, not on April 15, 1941. It seems to petitioner as a matter of law, the contract of April 8, 1941, was the contract of his employment, and if any written contract was entered into thereafter, it could have reference only to that portion of the employment with which it dealt.

(2) Petitioner was injured in his employment as a seaman-fisherman, while his boat was in Mexican waters, about half a mile off Guadalupe Island. [Clk. Tr. p. 141.]

It has not been questioned that, to and including the time of trial, these injuries were disabling, and caused pain and suffering. The two courts below held petitioner entitled to maintenance and cure only to that date his condition reached the *maximum degree of recovery,* some seven months prior to the date of trial. In view of the fact that the treatments given to petitioner, did improve

his condition, by relief, he was entitled to maintenance and cure to the date of trial.

Loverich v. Warner, supra;
Calmar S. S. Co. v. Taylor, supra.

To hold that a seaman should be cut off from further maintenance and cure at the date upon which his condition reached the maximum degree of improvement, even though further treatment is necessary, would be to throw him upon society for further care, treatment and support. It would seem that this should be undertaken by the industry in which he is engaged. Seamen have always been considered wards of Admiralty, and in turn Admiralty leans to their aid by liberally construing laws relating to their care. The latest indication of this nature of the United States Supreme Court, is in *Aguilar v. Standard Oil Co.*, 318 U. S. 724, 737, 63 S. Ct. 930, 87 L. Ed. 1107.

Seamen should receive their maintenance and cure until the date medical treatment is of no further assistance; maintenance terminating upon return to employment. "*Improve*" should be defined as "any relief of substantial character." *Relief from pain and suffering* should constitute "relief of substantial character."

(3) Further evidence and proofs before the United States Circuit Court of Appeals should be jealously guarded. This is true to prevent evidence from being unexcusably withheld during the trial, as well as other reasons. Here, however, a different condition exists. We have a change in the condition of the petitioner's condition. To admit new evidence in the trial *de novo* would prevent a great injustice from being done to petitioner. At the time of the trial, the United States Public Health

Service was of the opinion that petitioner's condition had not improved from June 3, 1942, to the date of the trial, except that the treatments definitely improved his condition as to pain. Treatment was given to the petitioner continuously after June 3, 1942, by the United States Public Health Service, and on April 16, 1943, he was allowed to return to work as recovered from his disabling injury. The United States Circuit Court held, at first, that there was no indication as to when petitioner recovered. This was called to the attention of the Court on Petition for Rehearing. There was an oral stipulation in open court indicating the date of recovery. [Clk. Tr. p. 263.] The Honorable Circuit Court of Appeals then amended their decision. [Clk. Tr. p. 270. However, the amendment states that it was not indicated the recovery resulted from the continued medical attention. Petitioner feels that this is directly begging the question, for treatment given him from the 5th day of May, 1941, to the date of trial, was directed to his injured shoulder. The United States Public Health Service does not give treatment to seamen for injuries or illness not arising out of or during their employment.

(4) The Circuit Court of Appeals was of the opinion that the testimony of the Master of the "Lucky Star" should not be taken. With this position petitioner does not agree. The Honorable Circuit Court of Appeals, in its decision, reversed the District Court in its opinion as to the weight to be given the *Shipping Articles,* holding they did not constitute the whole contract. There being no dispute in the oral evidence, a change in the purport of the shipping articles would require additional evidence to be taken, especially when, by affidavit the Master of

the "Lucky Star" stated he hired petitioner for both seasons. This becomes most significant because no counter affidavits were filed. [Clk. Tr. p. 246.]

(5) No consideration, to the established usages and customs with reference to fishing contracts was even considered by both Courts below. There was no dispute as to their being a custom, and that this custom was that fishermen were employed for both the tuna and sardine seasons. [Clk. Tr. p. 167-168, 193-194.]

The judge of the District Court stated that the Master stated he did not hire the petitioner according to custom. [Clk. Tr. pp. 175-176.] There is not a scintilla of evidence to sustain this statement.

It has long been the law that parties to a contract on subject matter concerning which known usage prevail, by implication incorporate them into their agreements, if nothing was said to the contrary.

Robinson v. United States, supra;
Hostetter v. Park, 137 U. S. 30, at 40, 34 L. Ed. 576;
Todd v. Meserve, 93 Cal. App. 370;
Sharp v. Kesling, 13 Cal. App. (2d) 639, 640;
Hind v. Oriental Products Co., 195 Cal. 655, 662.

Considerations of Public Policy.

A decision of this Court has become a necessity in determining to what extent a seaman is entitled to his maintenance and cure when his injury occurs in the service of his ship, and when it caused disability which reacts to treatment, although he has reached, what doctors say, "the maximum degree of improvement."

This question has not been decided by this Court, and we have a conflict in the decisions thereon by the United States Circuit Courts of Appeal.

Because of the thousands engaged in the fishing industry on the west coast of the United States in which custom and usage are an important part of their contract of employment, it is seriously important that it be determined whether, in the case of fishing contracts, custom and usage shall prevail, or whether it will be necessary for the multitude of fishermen to each have prepared for him, prior to entering into the employment of a fishing boat, a complete written contract, covering all of the details of his employment. Petitioner Martin Luksich believes a great injustice is done by reason of the failure of the Courts to consider established usages and customs, which were proved, in connection with the term of his employment. These decisions will have a direct bearing upon every fisherman on the West Coast of the United States, and probably all other fishermen in the United States where custom and usage is involved in his contract of employment.

Dated: San Pedro, California, April 17, 1944.

Respectfully submitted,

DAVID A. FALL,

Proctor of Petitioner.